In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1595

CLARENCE EUGENE MIDDLEBROOKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1969, petitioner was convicted of mail fraud in the United States District Court for the Middle District of Florida. He was sentenced to imprisonment for two years on some counts and placed on probation on the remaining counts. The conviction was affirmed on appeal. 431 F. 2d 299, certiorari denied, 400 U.S. 1009.

At trial petitioner had insisted on representing himself. Immediately after commencing service of his

prison sentence, he filed a motion to vacate under 28 U.S.C. 2255 in which he contended, *inter alia*, that he was not, at the time of trial, mentally competent to waive his right to counsel intelligently and knowingly. To prove this assertion, petitioner produced at the hearing a psychiatrist who had examined petitioner on two successive days in March 1971. Portions of the testimony are set forth in the appendix to petitioner's brief (Pet. App. 14a-17a). The gist of the testimony is that appearing at 17a:

> A. I say that the man is mentally ill—I think he has always been emotionally unstable, granted he had superior intelligence but to me he has not used it wisely and has consistently—not consistently, but he has used poor judgment in regard to vocational work.

The district court denied the motion to vacate and the court of appeals affirmed (Pet. App. 1a-7a). The court of appeals found that, considered in the light of the facts of record with respect to petitioner's conduct of his business and his actions at and after the trial, "the psychiatrist's testimony neither compels nor lends substantial support to the proposition that, as a matter of law, Middlebrooks could not have intelligently and knowingly waived his right to counsel in 1968" (Pet. App. 5a). This conclusion is manifestly supported both by the facts noted by the court of appeals and the testimony of the psychiatrist which petitioner cites.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor Generabl.

JULY 1972.

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